89-999

No. _____

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In The

# Supreme Court of the United States

October Term, 1989

MARION TERWILLIGER,

*Petitioner,*

v.

GREYHOUND LINES, INC.,
a foreign corporation and JAMES SELBY,
jointly and severally,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

WHETHER PLAINTIFF'S STATE LAW FRAUD CLAIM, ALLEGING DAMAGES CAUSED BY DEFENDANTS' ALTERATION AND WITHHOLDING OF PLAINTIFF'S MEDICAL RECORDS, IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

WHETHER, IN A CASE OF FRAUDULENT ALTERATION AND WITHHOLDING OF PLAINTIFF'S MEDICAL RECORDS, PLAINTIFF HAS MADE OUT A CASE FOR THE APPLICATION OF THE DOCTRINES OF FUTILITY AND REPUDIATION SUCH AS WOULD DEFEAT THE DEFENSE OF FAILURE TO EXHAUST HIS INTERNAL UNION REMEDIES.

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## OPINIONS BELOW

The defendants' motion for directed verdict at the close of plaintiff's proofs, and the trial court's denial thereof, are set out as Appendix A. The jury's verdict in favor of plaintiff in the amount of $250,000 in actual damages, and in the amount of $500,000 in consequential (exemplary) damages is set out as Appendix B. The order of October 14, 1986, entering judgment against defendants in the amount of $525,000 ($750,000 less a setoff for a settlement with a previous defendant in the amount of $225,000) is set out as Appendix C. The trial court's ruling from the bench, denying defendants' subsequent motions for JNOV and remittitur of damages, at an oral argument on January 29, 1987, is set out as Appendix D. The court's order of February 24, 1987, denying these motions, is set out as Appendix E. The Sixth Circuit's opinion reversing the trial court's rulings is published at 882 F2d 1033, and is set out as Appendix F. The Sixth Circuit's denial of plaintiff's motion for rehearing en banc is set out as Appendix G.

## JURISDICTION

The decision of the Sixth Circuit Court of Appeals was released on August 10, 1989. A timely motion for reconsideration was filed, which was denied on September 25, 1989. The jurisdiction of this court is invoked pursuant to 28 USC §1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 1947, 29 USC §185.

## STATEMENT OF THE CASE

### A. Statement of Facts

Marion Terwilliger began working for Greyhound in 1943. Except for two stints with the Marines, (1943 to 1946, and 1950-1951), and a medical leave in 1959-1960, Mr. Terwilliger drove a bus for Greyhound until 1966.

In 1966, while loading industrial dies onto a Greyhound bus, Mr. Terwilliger felt a burning sensation in his chest. He completed his workday, then reported the symptoms to Greyhound and found a doctor who began treating him. This doctor, Dr. John Kondomerkos, diagnosed a heart condition. On the basis of this diagnosis, Mr. Terwilliger voluntarily went on disability. In 1970, he passed the United States Department of Transportation (DOT) physical, and began driving buses for Short Line – a low-paying, local carrier.

However, Mr. Terwilliger was determined to return to work at Greyhound. He undertook a course of action to show to Greyhound that he was no longer suffering from any current heart condition. He continued to treat with Dr. Kondomerkos, who put Mr. Terwilliger through a series of EKGs, in order to show that plaintiff was suffering from no present heart condition, and that he was fit to return to work.

By April of 1971, Mr. Terwilliger, as shown through these serial EKGs, was clearly free of any present evidence of heart condition. Dr. Kondomerkos, by letter of April 13, 1971, reported to Greyhound that Mr. Terwilliger was "free of chest pain, shortness of breath, or fatigue", and recommended "that he can resume work with Greyhound."

Dr. Kondomerkos' letter did not achieve the desired purpose of putting Marion Terwilliger back to work. Instead, it touched off a series of events orchestrated by Greyhound representatives to deliberately keep Marion Terwilliger from returning to work for medical reasons which were not true and which Greyhound knew not to be true. Further, these fraudulent medical allegations remained on Marion Terwilliger's record long after Greyhound had rejected his return to work, and served to influence all others who investigated his record for purposes of determining whether to hire him. In short, Greyhound took deliberate steps having the effect of destroying Marion Terwilliger's entire life through a series of fraudulent and untrue allegations about his medical condition.

After receipt of the Kondomerkos letter, Greyhound, through defendant James Selby or his assistant J.R. Underwood, directed Mr. Terwilliger to report to Maybury Grand Clinic to be examined by the company doctor, Dr. Herman Kanter. This was pursuant to a contractual procedure often used by Greyhound to provide physical examinations to drivers seeking return from disability.

The Kanter examination took place on July 28, 1971. Greyhound records include a report purportedly arising from the examination. This report confirmed the findings of Dr. Kondomerkos. It specifically noted that the heart was normal, and that the cardiograph was within normal limits. According to Greyhound records, this original report set out two reasons for not recommending Marion Terwilliger's return to work. The first was vision below standard: a common problem, with a simple remedy – the driver simply changes his eyeglass prescription. The second, found immediately below the line stating vision below standard, is a nearly illegible reference to a certain code number under the DOT regulations.

Greyhound responded to its receipt of the Kanter report by circulating an internal "personal and confidential" memo per Al Young, a Greyhound dispatcher who worked under the direct supervision of defendant James Selby. This memo, dated August 13, 1971, stated that the company was not accepting the "disqualification on vision below standard." The memo requested that the company should strive to have "the following inserted under reason for not approving: In our opinion this man does not meet DOT requirements as set out in Part 391.41(b)(4) covering heart involvement." Dr. Kanter was contacted pursuant to this memo, and apparently was requested to submit an amended form clearly showing that Marion Terwilliger was suffering from heart disease, per the instructions of Greyhound.

Dr. Kanter's response must have come as quite a shock to the company. On August 24, 1971, he sent Greyhound a letter stating that he had declined Mr. Terwilliger's return to work only on the basis of vision

below standard. Dr. Kanter further stated that at no time was Marion Terwilliger diagnosed as suffering from a myocardial infarction. His letter goes on to say "His EKG at this time is within normal limits without evidence of remote or recent myocardial disease. Clinically, the heart is normal to auscultation and percussion." Dr. Kanter also submitted a corrected SD-5 form which clearly stated that M.D. Terwilliger was being rejected for re-employment only because his vision was below standard.

This company activity, and the dissent of Dr. Kanter, went on unbeknownst to Marion Terwilliger or his union. During this period, Marion Terwilliger's union representatives, Fred Daczka, president of the local, and Walter Koeller, union representative, were trying to reinstate Mr. Terwilliger to his position as driver. Marion Terwilliger had informed them that he had passed Dr. Kondomerkos' exam, and, he thought, Dr. Kanter's exam as well. By letter of August 11, 1971, J.R. Underwood, assistant to defendant James Selby, informed the president of plaintiff's union that Terwilliger "was examined by Dr. Kanter at the Maybury Grand Clinic, and found to be not qualified to return to driving under minimum physical requirements for drivers." When the union attempted to dispute this, and seek a reason why Dr. Kanter had disqualified Marion Terwilliger, by communication from Walter Koeller to James Selby on October 7, 1971, Mr. Selby responded with a letter which enclosed the copy of the *original* Kanter form, instead of the *corrected* one which Greyhound had in its possession at that time.

The union was accordingly misled that Dr. Kondomerkos and Dr. Kanter were in disagreement as to the condition of Marion Terwilliger's heart. Mr. Koeller has

testified that had the union known of the existence of the corrected SD-5 form, the union would not have requested a third doctor, but instead would have argued that Marion Terwilliger should be put back to work. Thus, in its dealing with the union in 1971, Greyhound continually misrepresented that the company doctor had failed plaintiff on his heart, and that a third doctor would be needed pursuant to contract because of the alleged split between plaintiff's personal doctor and the company doctor.

The company and union, pursuant to the company's misrepresentations, agreed to send Mr. Terwilliger to a third doctor. On September 22, 1971, defendant James Selby wrote to that third doctor, Dr. Breneman, to confirm the date of plaintiff's examination and to provide the doctor with "background materials." These background materials consisted solely of Marion Terwilliger's five year old, 1966 medical records. Selby withheld the 1971 findings of Dr. Kondomerkos and Dr. Kanter. In addition, pursuant to instructions, Selby advised the doctor in details as to the onerous duties of a Greyhound driver, including the requirement of changing tires and loading and unloading, and carrying package express weighing in excess of 100 pounds.

On September 24, 1971, Dr. Breneman examined the plaintiff, and, by letter of September 30, 1971, stated that his diagnosis was: arteriosclerotic heart disease, a *history* of angina syndrome, and a *history* of coronary insufficiency and/or myocardial infarction. It is significant that only the first finding constitutes a present finding; the other two are mere reiterations of the history provided Dr. Breneman by Greyhound, which history failed to

include the most recent examinations by Dr. Kondomerkos and Dr. Kanter.

At this point, Mr. Terwilliger did not know what to think. He knew he had passed the exam of his personal doctor, and was under the impression that he had passed the company doctor's exam. Yet all the physical evidence provided the union stated the contrary. The union informed him that the union could do nothing further on his behalf, and that if he wanted to go further he would have to get a lawyer.

Mr. Terwilliger did get a lawyer, who proceeded to bungle the suit by unnecessarily delaying bringing the cause of action. Unfortunately, Mr. Terwilliger's personal life paralleled the misfortunes in his lawsuit. Mr. Terwilliger worked a number of jobs, all for at or near minimum wage. He worked for Short Line as a driver until the mid-1970s, then worked at Wayne-Westland Community Schools as a probationary custodian and janitor. However, his attempts to gain a permanent position at Wayne-Westland were unsuccessful because of the history of heart disease as shown in the medical records provided his employer by Greyhound. He went back to minimum wage jobs, which he continued to work for the remainder of the decade. This succession of low-paying jobs forced Mr. Terwilliger into bankruptcy, where he lost his home. He also suffered many marital problems, which culminated in a divorce. A major factor in his divorce was his continued determination to try to get his job back from Greyhound, in the face of what was, to outside observers (including his wife and family), solid evidence of his inability to pass the necessary medical examination.

As Mr. Terwilliger's personal life touched bottom, so too did his lawsuit. In 1980, after repeated unsuccessful efforts to find out the status of his lawsuit against Greyhound from his attorney, Mr. Terwilliger was forced to complain to the Michigan State Bar Association. As a result of the State Bar's intervention, Mr. Terwilliger discovered that the attorney had never filed suit in his behalf. Mr. Terwilliger thereafter sought further legal assistance and the return of his file from the attorney.

He then brought a legal malpractice action against the attorney for failure to diligently prosecute his legal rights. This lawsuit ended in settlement after a surprising development. On the morning that his lawsuit against the attorney was to have gone to trial, a crucial document was discovered – one which Greyhound had never provided to Mr. Terwilliger or any of his representatives, either in the union, or any of his attorneys. This document, the Al Young memo, was only discovered through serendipity – Greyhound had provided the defendant attorney in the legal malpractice action with its file in the case. Greyhound had also provided plaintiff's attorney a copy of the so-called Terwilliger file. However, Greyhound did not provide the same file to the same people – the defendant had been given a copy of the file including the Al Young memo, while the plaintiff was sent a copy of the file without it. The concealment of this document from Mr. Terwilliger and his representatives was continuously ongoing through 1985. When the concealed document was found, the suit against the attorney was settled, and the instant fraud suit was instituted.

Defendant has consistently set forth a different version of the above facts, and can be expected to do so

before this court as well. All of the above facts are supported by sworn testimony presented at trial. At that trial, defendant had ample opportunity to present evidence and to rebut plaintiff's evidence. At the end of that trial, the jury found for plaintiff. As noted by the trial court, the Honorable Horace Gilmore of the Eastern District of Michigan, the jury must have found that the particulars of the fraud alleged by plaintiff were true, or else it could not have returned the verdict that it did. This Honorable Court should not be misled by factual disputes in reviewing this case. Defendant should only prevail if, *taking plaintiff's allegations as true*, plaintiff's state law fraud claim is preempted by Section 301 of the Labor Management Relations Act, 29 USC §185.

**B. Proceedings Below**

On July 8, 1985, plaintiffs Marion and Doris Terwilliger filed a complaint in Wayne County Circuit Court against Greyhound Lines, Inc., James Selby and M.J. Jorgensen. Plaintiff alleged fraud, misrepresentation, negligence and breach of a labor contract. On August 26, 1985, defendants caused this action to be removed to federal district court.

On the first day of trial, plaintiff voluntarily dismissed Counts II and III of the complaint, those counts for negligence and breach of labor contract. During the trial, defendants moved for directed verdict at the close of plaintiff's proofs, which was denied by the court. This motion was renewed at the close of trial, also to be denied by the court. (Appendix A). Before jury deliberations, defendant Jorgensen and plaintiff Doris Terwilliger

were dismissed from the case. The jury returned a verdict in favor of Marion Terwilliger, the remaining plaintiff, in the amount of $250,000 in actual damages, and $500,000 in the amount of consequential (exemplary) damages (Appendix B), which verdict was then reduced by $225,000, the agreed upon setoff of the amount of settlement in the prior legal malpractice case.

Judgment was entered against defendants on October 14, 1986, in the amount of $525,000. (Appendix C). Defendants moved for judgment notwithstanding the verdict and for remittitur of damage, which motions were denied by the court after argument was had on January 29, 1987, (Appendix D), by an order dated February 24, 1987. (Appendix E).

Defendants then appealed to the United States Court of Appeals for the Sixth Circuit. Briefing and oral arguments were had, and, by opinion dated August 10, 1989, the United States Court of Appeals reversed the jury verdict, stating: "Terwilliger's state law claim is preempted by Section 301 of the Labor Management Relations Act, 29 USC §185, and [we] hold that this case should have been dismissed for Terwilliger's failure to exhaust the remedies available in the collective bargaining agreement." *Terwilliger v Greyhound Lines*, 882 F2d 1033 (6th Cir 1989). (Appendix F, at App. 19).

Plaintiff timely filed, on August 19, 1989, a motion for rehearing en banc, which was denied by order dated September 25, 1989. (Appendix G).

## REASONS FOR GRANTING THE WRIT

### I. THE SIXTH CIRCUIT DECISION CONFLICTS IN PRINCIPLE WITH THIS HONORABLE COURT'S DECISION IN *LINGLE V NORGE DIVISION OF MAGIC CHEF*, 486 US 399, AND WITH DECISIONS APPLYING *LINGLE* FROM THE THIRD AND FIFTH CIRCUITS.

The Sixth Circuit's application of Section 301 of the Labor Management Relations Act, 29 USC §185, to preempt plaintiff's state law fraud claim, is based on a flawed reading of Supreme Court rulings. Further, it conflicts with recent opinions from other federal circuits. This Honorable Court should grant plaintiff's petition so as to clarify the law in this important area of labor relations.

The case which governs the preemption issue, and which the Sixth Circuit misinterpreted, is *Lingle v Norge Division of Magic Chef*, 486 US 399; 108 S Ct 1877; 100 L Ed 2d 410 (1988). In *Lingle*, Justice Stevens, speaking for a unanimous court, traced the history of Section 301 preemption, beginning with *Textile Workers v Lincoln Mills*, 353 US 448; 77 S Ct 912; 1 L Ed 2d 972 (1957). The *Lincoln Mills* case provided that federal courts were not only given jurisdiction over controversies involving collective bargaining agreements, but were also authorized to fashion a "body of federal law for the enforcement of these collective bargaining agreements." *Id* at 451; 77 S Ct at 915. The next significant case, *Teamsters v Lucas Flour Company*, 369 US 95; 82 S Ct 571; 7 L Ed 2d 593 (1962), held that Section 301 mandated resort to federal rules of law in order to insure uniform interpretation of collective

bargaining agreements, and thus to promote the peaceable, consistent resolution of labor management disputes.

A more recent examination of this principle was provided in *Allis-Chalmers Corp v Lueck*, 471 US 202; 105 S Ct 1904; 85 L Ed 2d 206 (1985). In *Lueck*, the principle was established that if, in resolution of a state law claim, the court must ascertain the meaning of a collective bargaining agreement, or if a collective bargaining agreement is seriously implicated in the decision of the state law claim, the state law claim is preempted and federal labor law principles must be employed to resolve the dispute.

The *Lueck* ruling led directly to the holding in *Lingle, supra*. The *Lingle* case involved a claim of retaliatory discharge for filing a workers compensation claim. In *Lingle*, defendant had argued that because a "just cause" provision in the collective bargaining agreement prohibited the retaliatory discharge of which plaintiff complained, the state tort of retaliatory discharge was inextricably intertwined with the collective bargaining agreement, inasmuch as it would implicate the same analysis of the facts as would an inquiry under the "just cause" provisions of the collective bargaining agreement. This reasoning was followed by the Seventh Circuit Court of Appeals in holding plaintiff's claim preempted. 823 F 2d 1031, 1046 (7th Cir 1987) (en banc). This Honorable Court reversed, engaging in the following analysis:

> "In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for Section 301

preemption purposes." *Id* at 486 US 399; 108 S Ct 1883. See also *Caterpillar, Inc v Williams*, 482 US 386, ___; 107 S Ct 2425, ___; 96 L Ed 2d 318 (1987), cited in footnote 10 of *Lingle, supra*.

*Lingle* holds that application of state law is preempted by Section 301 only if such application *requires* the interpretation of a collective bargaining agreement. *Id* at 108 S Ct 1885. Further, footnote 12 of *Lingle* instructs that a collective bargaining agreement may, of course, be referenced in determining the damages suffered, but that such would not serve to preempt an otherwise unpreempted state law claim.

Under *Lingle*, which controls the instant case, the 6th Circuit erred in holding that plaintiff's fraud claim should be preempted. Plaintiff's claim is that defendant Greyhound fraudulently altered and withheld certain medical documents relating to the state of Marion Terwilliger's heart. The Sixth Circuit held that his sole remedy for fourteen years of damage caused by this fraud was to file a grievance. The Sixth Circuit failed to recognize that any grievance in 1971 would have been decided pursuant to fraudulent records, and that any grievance decided in 1985, after the fraud was discovered, would not have been able to compensate Marion Terwilliger for the full range of injuries suffered. Fraud such as occurred in this case cannot be remedied pursuant to grievance procedure. Only by reference to a strong state policy, of preventing fraudulent behavior, can plaintiff be made whole.

This instant case is not one in which interpretation of the agreement is required. The acts of which plaintiff complains are not prohibited by, or addressed in, the

collective bargaining agreement, except by implication. Defendants' acts of altering and withholding plaintiff's medical records were neither prohibited by nor permitted by the collective bargaining agreement. However, such acts were tortious and actionable under Michigan state law of fraud. The Sixth Circuit misconstrued *Lingle* in holding that plaintiff's claim was preempted by Section 301.

Significantly, the Sixth Circuit decision in Terwilliger conflicts with post-*Lingle* decisions out of both the Third and Fifth Circuits. The Third Circuit case is *Berda v CBS, Inc*, 881 F2d 20 (3d Cir 1989). In *Berda*, the Third Circuit faced the issue of whether:

> "state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon alleged misrepresentations of job security, made before the employee became a member of the bargaining unit, thereby conferring additional rights to those afforded by the collective bargaining agreement, are preempted by Section 301." *Id* at 20.

The Third Circuit answered this question in the negative, relying upon *Caterpillar, Inc, supra*. The *Berda* court held that because Berda's complaint did not "substantially depend" on analysis of the collective bargaining agreement, neither his pre-employment contract claims nor his post-employment tort claims were to be preempted. Similarly, in the instant case, Terwilliger's claim does not "substantially depend" on analysis of the collective bargaining agreement.

Similar in analysis and result to *Berda*, but more on point factually, is the Fifth Circuit opinion in *Wells v*

*General Motors Corp*, 881 F2d 166 (5th Cir 1989). In *Wells*, 32 plaintiffs brought suit, alleging state law fraud and misrepresentation claims against General Motors. In analysis which starkly conflicts with that undertaken by the Sixth Circuit decision in *Terwilliger*, the Fifth Circuit upheld the plaintiffs' right to bring those fraud claims.

In *Wells*, GM announced layoffs in 1983. Concurrent with that announcement, GM negotiated a separation agreement with the union, under which employees could opt for a severance payment in lieu of preserving their seniority and rehire rights. According to the plaintiffs, at meetings called to explain the plan to union members, a General Motors representative told them that they could be rehired if new jobs were created, although they would have to apply like everyone else. According to plaintiffs' allegations, however, when new positions opened in 1985, they were informed by management that because they had chosen the severance plan, they were ineligible for rehire. *Wells, supra*, at 168.

Plaintiffs brought suit in federal district court, alleging that GM had fraudulently misrepresented to the employees their future rights in inducing them to opt for the severance plan, and that plaintiffs had relied upon those representations to their detriment. GM argued that because future employment is a mandatory subject of bargaining, and because GM had presented the plan directly to the workers, rather than through the union, any state law claims were preempted, and a claim must be brought, if anywhere, before the National Labor Relations Board. The court first held that the district court, not the NLRB, had subject matter jurisdiction. The Fifth Circuit then held that, although the preemptive scope of

Section 301 of LMRA is broad, it is not so broad as to preclude a claim of fraud, under the facts alleged by the plaintiffs.

As stated by *Wells*, at 173:

> "GM presents a forceful argument that resolution of plaintiff's fraudulent misrepresentation claims requires interpreting the terms of the collectively bargained VTEP [the severance pay agreement]. Its claim is that in order to determine whether GM falsely represented the consequences of accepting the VTEP, there must be an examination and interpretation of the VTEP to determine what a truthful representation would have been. In such a case, it argues, preemption occurs."

The court found GM's argument to be flawed for two reasons. First, Section 301 only preempts state law claims when those are "*substantially* dependent upon analysis of the terms of the collective bargaining agreement." *Wells*, citing *Lueck*, 471 US at 220; 105 S Ct at 1915. Second, the court held that the plaintiffs' claim was that GM fraudulently induced individual employees to opt for the contract by making extraneous promises outside of the contractual language. As the court noted, this fraudulent behavior did not have anything to do with the contents of the contract.

On this basis, the *Wells* court held as follows:

> "Therefore, we hold that where, as here, the employees/plaintiffs' state law claims are founded upon contractual rights or common law rights independent of those which the collectively bargained agreement creates, a defense that relies upon the provisions of a collectively bargained agreement does not invoke federal

> preemption unless that agreement contains provisions that govern, or reasonably might be construed as governing, the circumstances at hand." *Id* at 881 F2d 174. See also *Anderson v Ford Motor Company*, 803 F2d 953, 957 (8th Cir 1986), cert den, 483 US 1011, 107 S Ct 3242, 97 L Ed 2d 747 (1987), where the court held that the employee's rights to gain redress for Ford's fraudulent promise of security against being bumped by employees on the preferential hiring list was independent of any contractually established expectations of the parties." *Wells*, footnote 18.

The instant case cries out for the *Wells* interpretation, which accurately interprets the post-*Lingle* federal law. Herein, there is no contractual provision which can be interpreted as allowing the company to withhold certain medical records, and to alter others, so as to create the appearance of a conflict between the patient's doctor and the company doctor. Just as in *Wells*, the fact that defendant has chosen to defend its behavior by reference to the collective bargaining agreement does not preempt plaintiff's state law fraud claims. Just as in *Wells*, the fact that defendant conducted its fraud against the backdrop of collective bargaining agreement provisoins does not preempt plaintiff's state law fraud claims.

Petitioner urges that this Honorable Court grant the Writ of Certiorari so as to bring the Sixth Circuit in line with the proper interpretation of *Lingle*, as was set forth by the court in *Wells v GMC, supra.*

## II. THE SIXTH CIRCUIT DECISION IMPROPERLY INTERPRETS THE DOCTRINES OF REPUDIATION AND FUTILITY, BOTH OF WHICH ARE APPLICABLE TO THE INSTANT CASE, TO EXCUSE PLAINTIFF'S FAILURE TO EXHAUST INTERNAL UNION REMEDIES, IN A CASE INVOLVING ACTUAL FRAUD.

The Sixth Circuit's remarkable opinion on this subject is as follows:

> "Certainly, viewed in a light most favorable to plaintiff, his employer, whether genuinely fearing his heart was not up to the stress of his job, or implied baser motives, pursued a course of action to achieve its objectives which is at least unethical, if not downright dishonest. This circumstance does not, however, lead inexorably to the conclusion that arbitration, if pursued, would have been futile." *Terwilliger, supra*, at 882 F2d 1039. (Appendix F, at App. 30-31).

Such a reading misconstrues the futility exception, as set forth in *Glover v St. Louis-San Francisco Railway*, 393 US 324, 329-30; 89 S Ct 548; 21 L Ed 2d 519 (1969). In fact, the Sixth Circuit's narrow reading completely swallows the futility exception. In *Glover*, it would have been futile to file a grievance because of racial discrimination, which predictably would have led to a defeat in a useless grievance procedure. Yet, under the Sixth Circuit rationale, the Glover plaintiff was obligated to file a futile grievance, because the mere fact of racial prejudice does not lead inexorably to the conclusion that such grievance, if pursued, would have been futile. Such an assertion would be contrary to the overall purposes of federal labor relations policy.

Such an interpretation is also at odds with the facts. The facts as established at trial, as found by the jury, and upheld by the trial court, indicate that any hearing, taking place immediately after Greyhound's refusal to reinstate Marion Terwilliger as driver, would necessarily have been undertaken with documents that were fraudulently altered, and without documents that were fraudulently withheld by the company. To state that a grievance would have been anything but futile in that circumstance is to misunderstand the nature of the common law fraud which the company engaged in in this case, and to deny the existence of the futility doctrine itself.

Plaintiff also proved that the other exception, repudiation, applied. The doctrine of repudiation was recognized in *Vaca v Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967). Repudiation is not often found, but then facts such as those presented by this case do not arise frequently either. In the instant case, the company had repudiated the entire contractual bargaining agreement, and was simply operating on a base of raw power in its dealings with the union on this matter, as evidenced by trial testimony of defendant Selby, who testified that a general omnibus clause allowing the company to run itself the way it sees fit in matters not directly contradicting other specific provisions of the union contract, should be read to allow the company to negate any section of the remainder of the bargaining agreement if it so chooses. This testimony, taken in conjunction with the proof of fraudulent behavior and concealment on the part of the company, shows that as to Marion Terwilliger, the company had absolutely repudiated the collective bargaining agreement, and was in fact relying only upon the so-called grant of absolute power contained in Article 1, the

General Management section. The company's position, stripped to its essentials, is that it was free, in determining Marion Terwilliger's status, to disregard specific contractual obligations, and further was free, at the same time, to falsely represent that it was following the procedure called for by those specific contractual obligations. This constitutes repudiation pursuant to *Vaca, supra.*

The instant case involves both exceptions – repudiation and futility. The company repudiated the contract, and to file a grievance in the face of the then-undiscovered company fraud would have been futile. Under the circumstances of this case, Marion Terwilliger was properly held not to have been obligated to exhaust his union or contractual remedies. Fraud of the magnitude engaged in by the company here stands independent of any interpretation of any collective bargaining agreement's clause or policy. When fraud of the magnitude of this case is discovered, mere grievance procedures cannot begin to redress the injuries that were caused by such a fraud, especially where such fraud lasts more than 10 years, and serves to destroy the employee's entire life. The defense of failure to exhaust internal union remedies should not be available to the company here. The trial court rejected defendant's assertion that plaintiff's claim should fail as a matter of law, and allowed the jury to determine whether plaintiff was obligated to pursue his internal remedies. The jury, in its answer to special question number 1, found that plaintiff was not. This Honorable Court should reinstate that finding, pursuant to establishing coherent, meaningful federal labor policy.

## CONCLUSION

The Sixth Circuit's opinion below misconstrues *Lingle, supra,* and directly conflicts with the proper interpretation of *Lingle* as set forth in *Wells, supra.* To properly resolve this conflict, and to set forth clear indication of the course of federal preemption under Section 301 of the LMRA in cases involving allegations of state law fraud which tangentially involve reference to a collective bargaining agreement, but do not substantially depend upon interpretation of that collective bargaining agreement, Petitioner urges this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

CHARFOOS & CHRISTENSEN, P.C.

DAVID R. PARKER
Counsel of Record

J. DOUGLAS PETERS
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## APPENDIX A

(p. 697) THE COURT: All right, gentlemen. Thank you very much.

The motion is a motion for directed verdict based upon the statute of limitations, failure to exhaust union remedies and the like.

I am going to deny the motion for the following reasons.

Number one, there is obviously a clear duty to pursue contract remedies, but I am satisfied a fact issue arises here as to whether they should have been followed in view of the fact that the exculpatory report of Dr. Kanter was never furnished to the union. The only report that was furnished to the union. The only report that was furnished to the union by the company was the report that had written on it section, whatever the section number is, referring to DOT regulations. That was the only one ever forwarded to the union and the union readily, after receiving that report, agreed that they would go to a third medical doctor under the terms of the contract, a third medical examination. I think a question of fact remains that this jury can resolve as to whether it would have been futile to go. Certainly if there is futility to (p. 698) exercise contract remedies, then clearly they do not have to do so if it is shown. That is a fact question, if it is futile.

Secondly, with reference to the fraud, the fraud is claimed with the failure of the company to furnish that and then the basis, the mens rea shown by Exhibit 11, which is the memo per Al Young. I think there is sufficient evidence here to go to the jury on the question of

fraud and on the question of whether they should have pursued their collective bargaining agreement. That, of course, goes to whether they would have pursued it because of the failure of the company to furnish the proper report to the union. An argument very well could be made and certainly can that the union could have said we won't go because here is a report from Dr. Kanter that says you are not qualified and we agree to go to a third one on your behalf and there is a negative report there, so therefore we won't grieve. On that basis generally I will deny the motion for directed verdict.

* * *

(p. 757) (The following occurred in chambers with all counsel present)

THE COURT: Before the Court now is a motion by Mr. Acho for a directed verdict as to the Plaintiff wife on her derivative claim. I have determined that there is no basis for the wife's claim and therefore the motion for directed verdict as to Mrs. Terwilliger will be granted.

MR. CHARFOOS: May I make one argument, because I disagree with the Court's earlier statements off the record that there was no evidence against Jorgensen. If Selby is guilty of fraud, which it is the Plaintiff's position, he did make one statement that is just clear and loud, "Whatever I did was under the direction of Mr. Jorgensen. He was my boss."

THE COURT: I don't think there is sufficient evidence of Jorgensen's participation to go to the jury, so I will grant the motions for directed verdict as to Mr. Jorgensen.

MR. ACHO: Your Honor, for the record, we are renewing our earlier motion for directed verdict.

THE COURT: I have already denied that.

It is on the record.

* * *

## APPENDIX B

Marion Terwilliger v. Greyhound Lines, Inc.

Question 1

Was Mr. Terwilliger, under the facts in this case, obligated to pursue his contractual remedies of grievance and arbitration?

___ Yes ___ No

(If the answer to Question 1 is yes, do not answer any further questions)

Question 2

If the answer to Question 1 is no, did Defendant Selby practice fraud upon the Plaintiff?

___ Yes ___ No

Question 3

If the answer to Question 2 is yes, was that fraud a proximate cause of the damages to Plaintiff?

___ Yes ___ No

Question 4

If the answer to Question 1 is no, did Defendant Greyhound Lines, Inc. practice fraud upon the Plaintiff?

___ Yes ___ No

Question 5

If the answer to Question 4 is yes, was that fraud a proximate cause of the damages to Plaintiff?

___ Yes ___ No

Question 6

If the answer to either Question 3 or Question 5 is yes, did the Plaintiff suffer damages?

___ Yes ___ No

Question 7

If your answer to Question 6 is yes, what were his actual damages?

$___

Question 8

If you find actual damages, did the Plaintiff suffer consequential damages?

___ Yes ___ No

Question 9

If the answer to Question 8 is yes, what is the amount of consequential damages?

$___

_____

Foreperson

Dated:

_____

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARION TERWILLIGER,

PLAINTIFF,

vs.

GREYHOUND LINES, INC., et al.,

DEFENDANTS.

CIVIL ACTION NO. 85 CV 73806 DT

Hon. Horace W. Gilmore

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*ORDER OF JUDGMENT*

(Filed Oct. 15, 1986)

AT A SESSION OF SAID COURT HELD IN THE FEDERAL COURT-HOUSE, CITY OF DETROIT, COUNTY OF WAYNE, MICHIGAN ON OCT 14 1986

PRESENT: HON. HORACE W. GILMORE
U. S. District Judge

This matter having been heard in open court, and the jury having rendered its verdict on the verdict form, said form being a part of this Order,

And further, the jury having awarded compensatory damages in the amount of $250,000.00 and consequential (exemplary) damages in the amount of $500,000.00, for a total of damages in the amount of $750,000.00 against the Defendants,

And further, pursuant to a stipulation of the parties, the amount of $750,000.00 is to be reduced by $225,000.00,

IT IS HEREBY ORDERED AND DECREED that Judgment is entered against Defendants Greyhound Lines, Inc. and James R. Selby in the amount of Five Hundred Twenty-Five Thousand (525,000.00) Dollars, with costs to be taxed and interest to run from entry of this Judgment.

/s/ Horace W. Gilmore
U. S. District Judge

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## APPENDIX D

(p. 14) THE COURT: This matter is here on a motion for judgment notwithstanding the verdict and a motion for remittitur. The motion for JNOV is denied.

The case tried fully last summer before the Court. It is an action in which wrongful discharge was claimed. This was basically a 301 action and an action for damages.

The jury found that Plaintiff was claiming benefits because Greyhound fraudulently concealed from him the fact that after he had some problems, a second doctor had cleared him to return (p. 15) to work and a Greyhound representative had written a report to the doctor trying to get him to change the opinion, that the union was never informed of this letter, and that because of the fraudulent concealment of the Greyhound Company, he did not pursue union remedies and did not pursue remedies under the collective bargaining agreement.

Many of these matters have been fully argued before on the statute of limitations and the necessity of following contractual provisions on motions for summary judgment prior to trial which I denied. We now have a fully developed record on the matter. The jury found that there was fraudulent concealment by its verdict. Although there were no specific questions answered, they had to have found fraudulent concealment of significant facts by Greyhound or they could not have returned the verdict they did.

Defendant makes five grounds for granting the judgment NOV. First, the failure to exhaust contract remedies,

and they claim that the case must be dismissed as they argued in their summary judgment motion and in the motion for directed verdict because the Plaintiff failed to file a grievance and exhaust grievance and arbitration (p. 16) under the collective bargaining agreement.

Of course it is a general rule that a person filing a 301 claim must attempt to use contract grievance procedure as a general rule. However, there is an exception to that, to the exhaustion requirement through contractual remedies, laid out in *Vaca v. Sipes* which is one of the basic cases on this, *Vaca v. Sipes* being 386 U.S. 171. The Supreme Court says there at Pages 184 and 185:

> "For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of- (p. 17) contract claim despite his failure to secure relief through the contractual remedial procedures. "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action."

The Court went on to point out that another situation was when an employee had been prevented from exhausting the grievance procedure by the union's breach of the duty of fair representation.

The whole gravamen of the Plaintiff's Complaint and his proofs in this case was that he did not know that Defendant's refusal to put him back on the job violated the contract because the Defendant (p. 18) fraudulently concealed the medical report and the letter of the Greyhound executive asking the report be changed. He therefore contends that the defendant should be estopped from defending the action on the basis the Plaintiff failed to file or process a grievance.

I think the facts of this case fit well within the *Day* analysis, *Day v. UAW*, 466 F.2d 83, a Sixth Circuit case in 1972, where the Court said that the exhaustion requirement must be given a reasonable and common sense application to the facts of the case. Here I think it is clear that the facts of this case fit within the *Day* analysis and fit within the *Vaca v. Sipes* analysis. It doesn't make sense that Plaintiff here should be barred as a matter of law from suing Greyhound because he didn't file a grievance when the whole nature of his claim is that he did not know he had a grievance because of the fraud and falsification and hidden medical report accomplished by Greyhound, all of which was found by the jury. So certainly that is no basis for granting a JNOV.

The second argument of Plaintiff is that the failure to sue the union for the breach of duty of fair representation and failure to proceed that way exonerates the Defendant in this case, but (p. 19) *Vaca* clearly points out that one of

the situations where an employee is not required to exhaust union remedies before he can sue in Court is a situation where his union didn't breach the duty. Here it does not make any sense to say the Plaintiff would be required to sue his union because of the breach of duty of fair representation when the company breached the contract and fraudulently concealed from not only the Plaintiff but also the union the medical report of the company doctor which report would have allowed the Plaintiff to go back to work. The union didn't know about it, the Plaintiff didn't know about it, and it would have been a futile gesture at that point for him to pursue a grievance procedure because the union, based upon the medical reports they had and not being aware of the fraudulent concealment by the Defendant, would have dismissed the grievance and quite properly so. So that is certainly no basis for JNOV.

The next claim is that Plaintiff failed to prove or establish the elements of fraud or deceit. I think there is no basis whatever in that case. The record clearly supported the jury's verdict that Greyhound knew that Plaintiff had passed the medical examination enabling him to go back to work. They deliberately held this information, submitted a mis- (p. 20) leading and incorrect medical report showing that he had failed an examination due to a heart problem. That clearly raises a factual question of fraud there to go to the jury and it was properly put to the jury.

The next claim is that the claim is barred by the statute of limitations. Well, I don't think there is any basis to that. The record clearly shows that at the very earliest date, the very earliest date the Plaintiff would have

known about this medical report was in 1984 and the suit was in 1985. There is a claim that they really didn't know about the fraud until they found the letter from the officer at Greyhound and that therefore it didn't arise until 1985. But taking the 1984 date, there is no question but what in this situation that is well within the statute of limitations which is obviously a two-year statute of limitations.

*DelCostello v. International Brotherhood of Teamsters*, 76 L.Ed.2d 476, does not apply in this case where they use a six month statute of limitations in 301 claims. This is not a hybrid case. It does not come under *Badon*. Looking at the Michigan Statute of limitations and the State tolling provisions, clearly there is at least a two year statute of limitations. As the Sixth Circuit pointed out most recently (p. 21) in *Apponi v. Sunshine Biscuits*, No. 85-3782 and 85-3783, decided January 15, 1987, on Page 7 of the slip opinion, the Court held:

> "However, in *DelCostello* the Court held that the six-month statute of limitations period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), is applicable to hybrid section 301/fair representation actions. The Court limited its holding to the so-called hybrid action against both employer and union, distinguishing rather than overruling International Union, *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, which applied the State limitations period for breach of contract actions to an action by a union alleging a breach of the collective bargaining agreement. Thus, Federal Courts may still resort to the most analogous State statute of limitations where, as here, the action does not impli- (p. 22) cate the breach of the union's duty of fair representation."

That is clearly the case in this case. The State statute tolling provisions would toll this until at least 1984 and then a two year statute would apply and the case was started well within that period.

Finally, it is claimed that Plaintiff misled the Court into believing that he had his first knowledge of the fraud in June or July of 1985. I don't know how that is a basis for a judgment NOV. There can be a dispute of fact there but in all events it was 1984 clearly before the cause of action accrued.

For those reasons I deny the motion for judgment NOV.

With reference to the Defendant's motion for remittitur, there is some kind of a strange argument made by Defendants that Plaintiff has unclean hands because he slept on his rights for so long. I don't see any way to put an equitable doctrine of clean hands into the legal question of whether remittitur is appropriate. It just doesn't make any sense. The jury awarded $250,000 actual damages and $500,000 exemplary damages. Certainly, as far as the actual damages of $250,000 is concerned, there (p. 23) was evidence at trial that the Plaintiff could have earned $414,000 in the period involved and with the offset for disability it still would amount to $250,000, so clearly on the actual damages the verdict is well within the range of the testimony.

With reference to the exemplary damages, I don't think the proper analysis on exemplary damages comes under *Kewin*. Really what we are talking about is whether exemplary damages can be awarded under 301 lawsuits for breach of the collective bargaining agreement against

employers. It appears to me that the Sixth Circuit has never ruled specifically on that question and there is a Circuit split. Most Circuits have held that punitive damages may not be awarded against unions in a Section 301 breach of the duty of fair representation and the Sixth Circuit has held that in *Farmer v. ARA Services*, 660 F.2d 1096 and also in *Badon*, which is *Badon v. General Motors*, 679 F.2d 93, but *Badon* and *Farmer* do not rule on whether punitive damages may be recovered under 301 suits against employers for breach of the contract. The Sixth Circuit has never specifically ruled on that point and there is a clear Circuit split. The Third and Ninth Circuits in *United Shoe Workers v. Brooks Shoe*, 298 F.2d 277, and the Ninth Circuit in *Williams v. Pacific* (p. 24) *Maritime Association*, 421 F.2d 1287, have held there is never any punitive damages in any Section 301 case. However, the Second Circuit affirmed without an opinion a ruling by a District Court that punitive damages are recoverable from an employer in a 301 suit for breach of contract if the employee demonstrated both a breach of contract and a wilful abuse of duty imposed as a result of its position of authority and trust. That is *Refino v. Feuer Transportation Company*, 480 F.Supp 562, affirmed without opinion by the Second Circuit at 633 F.2d 205. In *Holodnak v. Ayco*, 514 F.2d 285, the Second Circuit agreed with the District Court's statement that punitive damages were available for breach of contract but held that they were inappropriate where the District Court expressly held they were not necessary to deter future contract violations.

Many lower Court cases have held that punitive damages may be available. *Crawford v. Pittsburgh-Des Moines Steel Company*, 386 F.Supp 290 from the District of

Wyoming; *United Steel Workers v. Butler* from the District of Michigan, 66 CCH 11 Labor Cases 707. Other Courts have held that it is somewhat unclear whether punitive damages could be awarded against employers, but if they could, it could only be done in outrageous or extraordinary (p. 25) circumstances. That is the Eighth Circuit in *Butler v. International Brotherhood of Teamsters*, 514 F.2d 442, and *Hechenberger v. Western Electric*, 570 F.Supp 820.

In short, the Circuits are split but I am inclined to follow, however, the Second Circuit, which holds that punitive damages are recoverable when there was a breach of contract and a wilful abuse of duty imposed because of position of authority and trust, and I clearly think that fits this case like a glove. That being so, I think punitive damages are not out of line and I will deny the motion for remittitur.

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## APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARION TERWILLIGER, and DORIS TERWILLIGER,

Plaintiffs,

v

GREYHOUND LINES, INC., a foreign corporation, JAMES SELBY and M.J. JORGENSEN, Individually, Jointly and Severally,

Defendants.

_____/

Case No: 85 CV 73806 DT

HON: HORACE W. GILMORE

*ORDER*

At a session of said Court held in the Federal Courthouse, City of Detroit, State of Michigan on FEB 24, 1987

PRESENT: HONORABLE HORACE W. GILMORE
United States District Judge

This matter came to be heard on the 29th day of January, 1987, on Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for Remittitur.

The Court having fully considered all of the arguments, and based upon its oral Opinion and Decision from the bench,

Now therefore, **IT IS HEREBY ORDERED** that Defendants' Motion for Judgment Notwithstanding the

Verdict is DENIED, and the Motion for Remittitur is DENIED.

/s/ Horace W. Gilmore
HONORABLE HORACE W. GILMORE
United States District Judge

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## APPENDIX F

No. 87-1236

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| MARION TERWILLIGER AND DORIS TERWILLIGER,<br><br>*Plaintiffs-Appellees,*<br><br>v.<br><br>GREYHOUND LINES, INC., a foreign corporation, and JAMES SHELBY, jointly and severally,<br><br>*Defendants-Appellants,*<br><br>M.J. JORGENSEN,<br><br>*Defendant.* | ON APPEAL from the United States District Court for the Eastern District of Michigan. |

Decided and Filed August 10, 1989

Before: ENGEL, Chief Judge*; MERRITT and KRUPANSKY, Circuit Judges.

ENGEL, Chief Judge, delivered the opinion of the court, in which KRUPANSKY, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 16-17) delivered a separate opinion concurring in part and dissenting in part.

ENGEL, Chief Judge. Defendant Greyhound Lines, Inc. ("Greyhound") appeals the judgment of the district

*The Honorable Albert J. Engel assumed the duties of Chief Judge April 1, 1988.

court awarding plaintiff Marion Terwilliger damages following a jury determination that Greyhound committed fraud and misrepresentation under Michigan law against Terwilliger by denying Terwilliger's application for reemployment in 1971. For the reasons stated below, we find that Terwilliger's state-law claim is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and hold that this case should have been dismissed for Terwilliger's failure to exhaust the remedies available in the collective bargaining agreement.

## I.

Marion Terwilliger was first employed as a bus driver by Greyhound in 1943 and was a member of the local chapter of the Amalgamated Transit Union ("Union") throughout his employment. In 1966, after Terwilliger experienced heart problems, his doctor disqualified him from employment as a bus driver with Greyhound. Pursuant to his rights under the collective bargaining agreement between Greyhound and the Union, Terwilliger was then granted disability pension status. In 1970, Terwilliger passed the Department of Transportation physical and began driving buses for a local carrier, and in 1971, he reapplied to Greyhound for employment. His application included a recommendation of fitness for employment from his personal physician.

Pursuant to the collective bargaining agreement, Greyhound referred Terwilliger to an independent physician, Dr. Herman Kantor, for a second examination. Dr.

Kantor's report did not recommend him for reemployment. The report listed two reasons for the recommendation: Terwilliger's vision was below standard and a Department of Transportation code number relating to heart disease. After Greyhound asked Dr. Kantor to clarify his findings, Kantor sent a letter and a second examination report which stated that Terwilliger's vision was below standard, but that his heart condition met the Department of Transportation standards, though possibly not Greyhound's internal standards.[1] Greyhound then denied Terwilliger's petition for reemployment. Terwilliger wrote a letter to the Union challenging Greyhound's denial of his reinstatement.

Based only on the letter from Terwilliger's physician and Dr. Kantor's initial report,[2] the Union was faced with disagreeing physicians regarding Terwilliger's heart condition. Article 12 of the Collective Bargaining Agreement provides for this situation:

> Employees failing to pass medical examinations by competent medical authority approved by the Company may be disqualified for service. This disqualified employee or the Union may, within ten (10) days after such examination

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[1] The collective bargaining agreement does not limit Greyhound's right to enact stricter medical standards for its drivers than those adopted by the Department of Transportation.

[2] Dr. Kantor's letter and the second examination report were not given to Terwilliger or the Union, though no express explanation for this omission appears in the record. Therefore, in 1971 the Union only had access to the first report by Dr. Kantor.

> make written request to the Company for further examination by the employee and the other by the Company. . . . In the event of disagreement between the two physicians, a representative of the Company and a representative of the Union shall meet within ten (10) days from the date of written notice of disagreement between the physicians, to select a third physician. The third physician shall make an examination and the findings of a majority of three shall rule.

Following this procedure, the Union and Greyhound decided upon a third physician, Dr. Breneman, a cardiologist. Dr. Breneman determined that Terwilliger should not be reemployed by Greyhound due to his heart condition. Based on this report, Greyhound confirmed its denial of Terwilliger's reapplication for employment in 1971.

The Union advised Terwilliger that it could do nothing more for him and in 1973 he hired a lawyer to sue Greyhound. In 1980, Terwilliger learned that his attorney had not yet filed suit, and Terwilliger's separate malpractice action against the lawyer was settled for $225,000 in 1985.[3] In 1981, Terwilliger again sought reinstatement with Greyhound. Greyhound denied his request because he refused to provide updated medical reports on his condition. Terwilliger remained on disability status until 1983, when he reached his normal retirement age.

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[3] The record reveals that Terwilliger had agreed with his lawyer to delay bringing suit in order to increase the potential damages. In so doing, the attorney negligently let the time period for bringing suit lapse. This negligence by the attorney was the basis for Terwilliger's malpractice action which ended in a settlement for Terwilliger of $225,000.

In the course of Terwilliger's malpractice action against his lawyer in 1984, Terwilliger first gained access to the second examination report by Dr. Kantor. In July, 1985, he discovered an internal Greyhound memo[4] which

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[4] The memo, written for Greyhound's internal files by one of their dispatchers states:

J. Junglas telephoned and advised to call Mayberry Grand Clinic, Doctor Kantor, and have him forward another physical on M.D. Terwilliger. Disqualification on vision below standard not accepted by company. Have the following inserted under Reason for not approving:

"In our opinion this man does not meet the DOT requirements as set out in part 391.41(b)(4) covering heart involvement."

I telephoned Mr. Jorgensen and related the above information to him. I advised him that Mr. Terwilliger had signed the original physical form, and what about another physical form without Mr. Terwilliger's signature on it should the Union request to see the physical form. He advised to have the Company Doctor state on the corrected physical form the following:

"We neglected to state the patient's heart condition, therefore, it is necessary to issue a corrected physical form".

Mr. Jorgensen further advised to have the following clarified:

On physical form under THORAX: *Heart Normal to A&P*

Mr. Jorgensen advised the above should be clarified on the physical form.

I called Doctor Kantor and was advised he is on vacation until August 23rd, and spoke to Mr. Wayne Morche. He took the information related to us by the Safety Dept. He further

(Continued on following page)

he claims is evidence that Greyhound fraudulently withheld the second examination report in order to deny his reinstatement. Terwilliger claims that discovery of this memo in 1985 first led him to believe that Dr. Kantor had recommeded non-reinstatement based on Terwilliger's vision alone and that there did exist a second report.

In August 1985, Terwilliger filed the present suit seeking back pay and other damages, alleging state-law claims for breach of contract, negligence, and fraud and misrepresentation through Greyhound's denial of his reinstatement in 1971. Terwilliger claimed that Greyhound employees intentionally changed the first report by Dr. Kantor and concealed the second report in order to secure the Union's agreement to an examination by a third physician, all as part of a Greyhound plot to not rehire Terwilliger as a driver. At trial, with only the fraud and misrepresentation claim remaining, the jury returned

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(Continued from previous page)

advised that everything pertaining to Mr. Terwilliger's heart was normal, and A&P meant the heart beat is normal, and he did not know what they could put on the physical form under "Heart" that would disqualify him. I referred him to statement made by Lincoln Clinic for reason of Terwilliger's Disqualification and asked if he received a copy of it if it would assist him in determining the terminology to use; he advised it might. I told him I would have to obtain approval from Mr. Jorgensen.

Mr. Jorgensen advised to send copy of physical to clinic.

I advised Mr. Morche to have Doctor Kantor submit a corrected physical upon his return from vacation 8-23-71. Mr. Morche stated since he spoke with me earlier, he had located a copy of the physical form dated 8-2-66, but did not have a copy of the Supplementary Report dated 8-2-66, I advised him a copy would be forwarded.

a verdict for Terwilliger, awarding him $250,000 in actual damages and $500,000 in consequential damages. Pursuant to pretrial agreement, this was set-off by the $225,000 from Terwilliger's previous attorney malpractice award, resulting in a total award $525,000. Greyhound appeals.

II.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

The Supreme Court has determined that section 301 not only confers federal jurisdiction over controversies involving collective bargaining agreements, but also authorizes the federal courts to fashion a body of federal law for the enforcement of section 301. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957). In *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court determined that the federal law preempts local law so that a uniform body of labor law can be developed to avoid conflicts in the interpretation of collective bargaining agreements. Then, in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), the Court determined that the pre-emptive effect of the federal labor law extended to state-law tort claims which are "inextricably intertwined with consideration of the terms of the labor contract" as well as pure contract claims. In 1987, the Court summarized the preemption doctrine as follows: "Section 301 governs claims founded

directly on rights created by collective bargaining agreements, and also claims substantially dependent on analysis of a collective bargaining agreement." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2431 (1987).

In 1988, the Supreme Court clarified the scope of the terms "substantially dependent on analysis of a collective bargaining agreement" and "inextricably intertwined" in a tort context in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988). *Lingle* involved a claim of retaliatory discharge for filing a worker's compensation claim. The Court held that the claim was not preempted because "resolution of the state-law claim [did] not require construing the collective-bargaining agreement." *Id.* at 1882. The Court noted that the two elements of retaliatory discharge, that the employee was discharged or threatened with discharge, and that the employer's motive was to deter him from exercising his rights under the Worker's Compensation Act, were purely factual and did not involve interpretation of the terms of the agreement. *Id.*

On the basis of *Lingle*, this court has recently reconsidered a claim of tortious interference with a contract by a third party and found no preemption of that state-law claim because the claim could be resolved without interpreting the collective bargaining agreement. *Dougherty v. Parsec*, 872 F.2d 766 (6th Cir. 1989). *Dougherty* involved a claim against a non-signatory to a collective bargaining agreement who was not bound by the terms of the contract and thus not bound to the arbitration process for resolution of disputes. The court recognized that a major policy underlying the preemption principle was "that permitting state law claims would allow plaintiffs to

avoid the fundamental labor policy that contract disputes should be decided by arbitrators in the first instance." *Id.* at 771. Because the defendant was a third party to the contract and the relationship of the parties was not defined by the contract, there was no basis for preemption because a dispute between them would not have been subject to arbitration initially. Thus the court determined that preemption principles did not apply.

This court, en banc, also recently considered the issue of preemption under section 301 in *Smolarek v. Chrysler Corp.*, Nos. 86-2074, 87-1387 (6th Cir. July 12, 1989). *Smolarek* involved two types of claims: a claim of retaliatory discharge for filing a workmen's compensation claim and a claim under the Michigan Handicapper's Civil Rights Act. The court, en banc, determined that neither of the two claims was subject to section 301 preemption: first, because resolution of the claims did not require interpreting the terms of the collective bargaining agreement in force, and second, because the rights that the employee sought to vindicate were created by state law and did not arise solely under the terms of the collective bargaining agreement. Slip op. at 9.

Thus, in evaluating Terwilliger's claim, we must determine first, whether resolution of Terwilliger's state-law claim of fraud and misrepresentation requires interpretation of the terms of the collective bargaining agreement such that this claim should have been decided by arbitration pursuant to the terms of the agreement in the first instance and second, whether his claim is based on rights created by the collective bargaining agreement or under state law. Here, Terwilliger has pleaded his cause of action as one based upon fraud by the employer in

carrying out the process of examining a reinstatement request by a medically disqualified employee and misrepresentation regarding Terwilliger's physical condition when it negotiated with the Union for an examination by a third physician. Terwilliger attempted to frame his claim purely in state-law fraud terms. However, such "artful pleading" will not suffice to avoid preemption under section 301. *See Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988) ("Plaintiffs may not avoid removal by 'artfully pleading' their claims to omit references to preemptive federal law."). Terwilliger essentially has alleged that Greyhound, acting in bad faith, violated the provisions of the collective bargaining agreement.

Terwilliger in essence claims that Greyhound failed to abide by the terms of the agreement when it negotiated with the Union for an examination by a third physician. Resolution of this claim requires interpretation of the terms of the agreement in order to determine whether, in fact, Greyhound complied with them when it negotiated for the third physician.[5] To hold otherwise would allow plaintiffs to avoid the obligation of arbitration by "artfully pleading" their claims and would, in our view, eviscerate the strong policy favoring arbitration which has been a cornerstone of federal labor law since the

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[5] The third physician selected by representatives of management and the union found Terwilliger's heart condition to be disabling:

> It is my opinion that this gentleman does have significant coronary artery disease. For this reason he should not be employed in the operation of a commercial or passenger transport vehicle.

*Steelworkers Trilogy*.[6] Therefore because resolution of this claim does require a construction of the terms of the collective bargaining agreement, Terwilliger's claim is preempted by section 301.[7]

The rights which Terwilliger seeks to vindicate arise solely under the terms of the collective bargaining agreement. The agreement creates the right to re-employment claimed by Terwilliger that provides the only basis for the relationship between Terwilliger and Greyhound. "Section 301 governs claims founded directly on rights created by collective-bargaining agreements. . . ." *Caterpillar*

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[6] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[7] Even assuming that the second physical report was intentionally withheld, that report and Dr. Kantor's letter do not conclusively foreclose the application of Article 12 of the collective bargaining agreement pertaining to disagreeing physicians. The letter did not indicate that Terwilliger's heart condition enabled him to drive for Greyhound, but that his condition might not meet Greyhound's internal standards. Therefore, there still existed a situation involving disagreeing physicians' resolution of the disagreement would involve the terms of the agreement. Further, any analysis involving Greyhound's internal standards is itself uniquely a contractual question which should have been resolved in the first instance by the arbitration process specified in the agreement.

The question whether the company's physician finally concluded that Terwilliger was, or was not disabled – purely factual, though impaired obviously by company attempts to influence him – would in our view be the kind of decision entrusted to the arbitrator based upon the equivocal nature of his reports.

*Inc. v. Williams*, 107 S.Ct. 2425, 2431 (1987). Since both the relationship between the parties and the process for reinstatement were governed by the collective bargaining agreement, the claim must be preempted by section 301[8] if the important policies underlying the *Steelworkers Trilogy* are to be accorded more than mere lip service.

Preemption in this case, then, is more essential here as a matter of public policy since *both* triggers of section 301 preemption are present: resolution of the state-law claim directly requires construction of the terms of the agreement itself, and the rights sought to be vindicated and the relationship between the parties are created not by state law, but by the collective bargaining agreement itself.

Since this claim is preempted by section 301, it should have been first resolved through the grievance procedures established by the collective bargaining agreement.

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress.

*Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (footnote omitted) (emphasis in original). "[A]n employee

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[8] Interestingly, although relying primarily upon whether the terms of the contract would be interpreted during resolution of the state claim, in both *Lingle* and *Smolarek* the wage earner was suing to vindicate rights expressly conferred by state statute for the benefit of persons in his class and entirely separate from rights conferred by the contract.

[can]not sidestep the grievance machinery provided in the contract and . . . unless he attempt[s] to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court [will] be dismissed." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 563 (1976). It is undisputed that Terwilliger did not exhaust the remedies available to him either with the Union or pursuant to the collective bargaining agreement. "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal-labor contract law that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers*, 471 U.S. at 220. Therefore this case should have been dismissed by the district court for failure to exhaust available remedies.

Terwilliger claims that he is excused from exhausting the available remedies either because pursuing such remedies in this instance would have been futile or because Greyhound repudiated the contract and its dispute resolution procedures. The record does not support either of these contentions.

A. Futility

Terwilliger first claims that pursuing the remedies set forth in the collective bargaining agreement would have been futile. Certainly, viewed in a light most favorable to plaintiff, his employer, whether genuinely fearing his heart was not up to the stress of his job, or implied baser

motives, pursued a course of action to achieve its objections which is at least unethical, if not downright dishonest. This circumstance does not, however, lead inexorably to the conclusion that arbitration, if pursued, would have been futile.

"[T]he exhaustion requirement is subject to a number of exceptions [where] doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor relations policy." *Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 329-30 (1969). One such exception occurs "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Id.* at 330. The Sixth Circuit requires "a clear and positive showing of futility before excusing a failure to exhaust. . . ." *Miller v. Chrysler Corporation*, 748 F.2d 323, 326 (6th Cir. 1984) (quoting *Winter v. International Brotherhood of Teamsters, Local* 639, 569 F.2d 146, 149 (D.C. Cir. 1977)). Terwilliger has made no such showing. That he subjectively may have thought such procedures were futile is insufficient. Even assuming the validity of his allegations that Greyhound engaged in fraud or deceit regarding the reinstatement process, this does not indicate that the company would not have cooperated with the dispute resolution process and does not constitute a clear and positive showing of futility. Such an assertion is similar to that made in *Miller, supra*, wherein the employees failed to initiate grievance procedures with the union because they believed that the union was in agreement with the company and would not have pursued their claim. Such a subjective belief was insufficient to excuse them from at least *attempting* to utilize the procedures. Here, Terwilliger admits that he did not

attempt to pursue his available remedies under the collective bargaining agreement.[9] Therefore, he has no basis to claim that such procedures would have been futile.

B. Repudiation

Exhaustion may also be excused "when the conduct of the employer amounts to a repudiation of [the] contractual procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Although repudiation of the contractual procedures is an excuse for exhaustion, such repudiation must be of the grievance procedures themselves. *See Anderson v. Ideal Basic Industries*, 804 F.2d 950 (6th Cir. 1986) (where employees filed grievance only two weeks prior to filing suit, company's failure to process it in the short time available did not constitute repudiation); *United Slate, Tile and Composition Roofers v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) (an outright refusal to comply with grievance procedures would constitute repudiation); *Geddes v. Chrysler Corp.*, 608 F.2d 261, 263 (6th Cir. 1979) ("Employers are normally estopped from seeking dismissal of a claim based on failure to exhaust remedies when they have taken the position that those remedies are not available to the

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[9] Indeed, had Terwilliger initiated the grievance procedures contemplated in the collective bargaining agreement, the second report and the letter as well as the internal memo may have come to light during the arbitration process and could have been resolved by the arbitrator if they affected his claim to reinstatement.

employees."). Terwilliger asserts that Greyhound repudiated the contract when it fraudulently withheld the second physical examination report and misrepresented Terwilliger's physical condition in order to secure Union agreement to a third physician's examination. However, Terwilliger has not asserted that Greyhound ever refused to abide by the terms of the contract regarding the available grievance procedures. In fact, Terwilliger never even filed a formal grievance on this matter, thus depriving Greyhound any opportunity to resolve the claim through the procedures found in the collective bargaining agreement. We therefore find no evidence of repudiation by Greyhound which excuses Terwilliger's failure to exhaust the remedies available to him under the collective bargaining agreement.[10]

III.

The national policy encouraging a uniform body of labor law, *Textile Workers v. Lincoln Mills*, 353 U.S. at 451, and encouraging arbitration as the strongly preferred means by which disputes involving collective bargaining agreements ought to be resolved, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), requires that the federal labor principles and the methods for dispute resolution provided by collective bargaining

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[10] Having determined that Terwilliger's claim is preempted by section 301 and should have been dismissed for failure to exhaust available remedies, we do not examine defendant's other contentions regarding statute of limitations, insufficiency of the evidence or the alleged errors by the trial court.

agreements should and must take precedence. We do not read the recent case law, such as *Lingle*, to imply anything less. Because Terwilliger's claim involves interpretation of the collective bargaining agreement and rights created solely by the agreement, Terwilliger's claim is preempted by section 301 of the Labor Management Relations Act and the relief to which he might be entitled is governed thereby. Before a section 301 action can be initiated, an employee must attempt to use the procedures available under the collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Terwilliger never attempted to invoke the procedures available to him. It follows, therefore, that his claim should have been dismissed by the district court for failure to exhaust the remedies available under the collective bargaining agreement, there being no evidence of futility of initiating the procedures nor evidence that Greyhound repudiated the contract regarding the grievance procedures.

We think that after viewing this court's decisions in *Smolarek* and *Dougherty*, as contrasted to the circumstances here, that this decision provides a reasonable and workable interpretation of the Supreme Court's intent as expressed in *Allis-Chalmers* and *Lingle*, and substantially relieves any tensions which might otherwise exist in this area.

For the foregoing reasons, the judgment of the district court is REVERSED, and the case is REMANDED with directions that it be DISMISSED for failure to exhaust available remedies.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I agree with the Court that this dispute cannot be resolved without interpreting the collective bargaining agreement. I further agree with the Court that the grievance process is not *now* futile as the plaintiff has actually discovered the alleged fraud. We should not, however, simply dismiss this case without having provided plaintiff an opportunity to pursue his claims. The plaintiff is still entitled to pursue in the grievance process the wrongs which he has alleged his employer committed.

This is a difficult and puzzling case because of the jury's finding that the employer, Greyhound, defrauded the plaintiff employee in the reinstatement and grievance process by manufacturing false medical reports and misrepresenting the diagnosis of the company's doctor. That conduct so misled the plaintiff, his counsel and his union representative that a fair grievance process became improbable during the period of fraudulent nondisclosure.

Once, however, the evidence of the employer's fraudulent misconduct became apparent at a later date, a full and fair grievance process became possible. That grievance process, not a lawsuit in state or federal court, was what the parties had bargained for. At this point in the history of this case, however, we encounter the problem of the limitations period for initiating the grievance process, for Greyhound prevented plaintiff from discovering its fraud until the limitations period had expired. It would be inequitable to allow Greyhound, on these facts, to escape the grievance procedure it has contracted for.

Rather, the employer's concealment of the real facts and the pendency of this lawsuit toll the running of the limitations period for the filing of a grievance proceeding. Hence the grievance process remains open even at this late date. The case should be remanded to the District Court with instructions to order the parties to proceed with the grievance process provided by the collective bargaining agreement. The arbitrator will be in a position to construe the terms of the collective bargaining agreement in light of the alleged fraudulent concealment of medical information and determine the appropriate award, if any.

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## APPENDIX G

No. 87-1236

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| MARION TERWILLIGER AND DORIS TERWILLIGER, Plaintiffs-Appellees, v. GREYHOUND LINES, INC., ETC., ET AL., Defendants-Appellants, M. J. JORGENSEN, Defendant | ORDER (Filed Sep. 26, 1989) |

BEFORE: ENGEL, Chief Judge; MERRITT and KRUPANSKY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
COURT

/s/ Leonard Green
Leonard Green, Clerk